2013 IL App (4th) 130161-U

NO. 4-13-0161

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 28, 2013
Carla Bender
4th District Appellate
Court, IL

In re: the Estate of MITCHELL WARTH, Deceased, EILEEN SHERIDAN WARTH, as Special Administratrix, Petitioner-Appellee, v. SARAH BUSH LINCOLN HEALTH CENTER and PATRICK HARTMAN, M.D., Respondents-Appellants.	))))))))	Appeal from Circuit Court of Coles County No. 10L17 Honorable Brien O'Brien, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Steigmann and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* Where the trial court's certified question seeks an answer on the ultimate finding of whether the physician's actions constituted a continuing course of negligent treatment, the existence of multiple questions of fact renders the question inappropriate for review under Illinois Supreme Court Rule 308.

¶ 2 In this action based on medical malpractice brought by petitioner, Eileen Sheridan Warth, as special administratrix of the estate of the deceased, Mitchell Warth, against respondents, Sarah Bush Lincoln Health Center (Center) and Dr. Patrick Hartman, the Coles County circuit court certified the following question for interlocutory review pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010):

"Does a consistent lack of screening for prostate cancer each time the patient visited the doctor constitute a continuing course of

> negligent treatment for a specific condition within the rule announced in *Cunningham v. Huffman*[, 154 Ill. 2d 398, 609 N.E.2d 321 (1993)]?"

We granted petitioner's application for leave to appeal. Upon further review, we find the trial court's certified question involves factual determinations, and thus it prematurely asks for a ruling on the ultimate applicability of the statute of repose in this case and on liability as well. Accordingly, we decline to answer the question.

¶ 3 I. BACKGROUND

¶ 4 In March 2010, the decedent filed a medical malpractice action against Drs. Hartman and Brett Miller and their employer, the Center, claiming the physicians had failed to screen the decedent for prostate cancer, diagnose the condition, and treat it. (Dr. Miller was voluntarily dismissed without prejudice from this case in May 2012.) The complaint alleged the decedent was under the care of Dr. Hartman from July 2004 to February 2007 and under Dr. Miller's care from August 2007 to June 2008. On July 23, 2008, the decedent was diagnosed with prostate cancer. The complaint asserted the decedent did not know and should not have known about the physicians' failure to comply with the applicable standards of care until after his cancer diagnosis. The decedent passed away on November 10, 2010; and the trial court later entered an order appointing petitioner, Eileen, as special administratrix of the decedent's estate. On November 29, 2010, respondents filed an answer to the complaint and raised the affirmative defense that decedent's action was barred in whole or in part by the applicable statute of limitations and/or the statute of repose.

¶ 5 In January 2011, petitioner filed a first-amended complaint against respondents

and Dr. Miller, asserting wrongful death and survival actions based on medical malpractice. Respondents filed an answer to the first-amended complaint, in which they again raised an affirmative defense that the action was time barred by the statute of limitations and/or the statute of repose.

¶ 6 In August 2012, respondents filed a motion for partial summary judgment, asserting the statute of repose (735 ILCS 5/13-212(a) (West 2010)) defeats the portion of the action based on treatment that occurred before March 26, 2006. Respondents asserted the continuing course of negligent medical treatment rule announced in *Cunningham*, 154 Ill. 2d at 406, 609 N.E.2d at 325, did not apply because (1) the failure to diagnose is not a continuous act, (2) a general practitioner's failure to diagnose does not fulfill the "specific condition" requirement, and (3) the decedent's injury was not cumulative. Petitioner filed a response, asserting *Cunningham* did apply because Dr. Hartman's series of neglect omissions occurred during an unbroken course of care and constituted a continuous wrong. Petitioner also noted the standard of care was a contested matter. Respondents replied, emphasizing Dr. Hartman did not provide treatment for the specific condition of prostate cancer. After a November 13, 2012, hearing, the trial court denied respondent's motion for a partial summary judgment.

¶ 7 On November 29, 2012, respondents filed a motion for a certified question. Petitioner filed a response, objecting to the motion. On February 6, 2013, the trial court granted the motion and certified the previously stated question. On February 20, 2013, petitioner mailed her application for leave to appeal pursuant to Rule 308 and complied with Illinois Supreme Court Rules 373 (eff. Dec. 29, 2009) and 12(b)(3) (eff. Jan. 4, 2013). Thus, her application was timely filed. On April 24, 2013, this court allowed the petitioner's application. Thus, we have

jurisdiction of this cause under Rule 308.

¶ 8 II. ANALYSIS

¶ 9 A. Review of Certified Questions

¶ 10 This court has set forth our review of a certified question as follows:

> "The scope of review in an interlocutory appeal brought under Rule 308 is limited to the certified question. [Citation.] A reviewing court should only answer a certified question if it asks a question of law and decline to answer where the ultimate disposition 'will depend on the resolution of a host of factual predicates.' [Citations.] This court refrains from answering a certified question where it calls for a hypothetical answer with no practical effect. [Citations.] A certified question pursuant to Rule 308 is reviewed *de novo*." *Spears v. Ass'n of Illinois Electric Cooperatives*, 2013 IL App (4th) 120289, ¶ 15, 986 N.E.2d 216.

¶ 11 B. The Statute of Repose

¶ 12 At issue in this case is section 13-212(a) of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/13-212(a) (West 2010)), which provides both a two-year statute of limitations and a four-year statute of repose in medical malpractice cases. *Follis v. Watkins*, 367 Ill. App. 3d 548, 556, 855 N.E.2d 579, 586 (2006). That section states the following:

> "Except as provided in Section 13-215 of this Act, no action for damages for injury or death against any physician, dentist, registered nurse or hospital duly licensed under the laws of this State,

> whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of such date occurs first, but in *no event shall such action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in such action to have been the cause of such injury or death*." (Emphasis added.) 735 ILCS 5/13-212(a) (West 2010).

Section 13-215 of the Procedure Code (735 ILCS 5/13-215 (West 2010)) contains a fraudulent-concealment exception, which is not at issue here.

¶ 13 The distinction between the statute of limitations and the statute of repose is the patient's discovery of the injury triggers the limitations period while the defendant's wrongful act or omission that caused the injury triggers the repose period. *Follis*, 367 Ill. App. 3d at 557, 855 N.E.2d at 586. Thus, "[t]he repose period begins to run regardless of whether the patient is aware of the negligence at the termination of treatment because the statute of repose is triggered by the 'act or omission or occurrence' causing an injury rather than by the patient's discovery of the injury as with a statute of limitations." *Follis*, 367 Ill. App. 3d at 557, 855 N.E.2d at 586-87 (quoting *Cunningham*, 154 Ill. 2d at 406, 609 N.E.2d at 325). By enacting the four-year outer limit on medical malpractice liability, the legislature specifically intended to curtail the "long tail" exposure to medical malpractice claims generated by the discovery rule. *Cunningham*, 154

Ill. 2d at 406, 609 N.E.2d at 325.

¶ 14 In *Cunningham*, 154 Ill. 2d at 405, 609 N.E.2d at 324, the plaintiff argued and the supreme court agreed the statute of repose's term "occurrence," when correctly construed could "include a continuing *negligent* course of treatment for a specific condition." (Emphasis in original.) The supreme court noted the following:

> "In construing the meaning of the phrase 'the act or omission or occurrence,' we find it improbable that the General Assembly intended the word 'occurrence' to be limited to a single event. Had it so intended, it could have simply stated that the statute begins to run on the happening of the 'specific act' or 'specific omission.'
>
> Further, to so narrowly construe this phrase could lead to absurd and unjust results. For example, if the word occurrence were interpreted to mean a single isolated event, patients who discovered that they were gravely injured due to negligent or unnecessary exposure to X-ray radiation or administration of medication over a span of years might be able to recover little, if any, in the way of damages. This would be so because a single dosage of radiation or medicine might be harmless, whereas treatment over time might be either disabling or even fatal. When the cumulative results of continued negligence are the cause of the injury, the statute of repose cannot start to run until the last date of

> negligent treatment. If the statute of repose were read to start on day one of the treatment in a span covering many years, a plaintiff could only seek recovery for the final four years. It is conceivable that the damage caused in the last four years might be either negligible or a small fraction of the harm caused over the continuum of negligence; thus, the recovery of damages would be negligible compared to the actual injury. Surely, the law could not contemplate such an unjust result." *Cunningham*, 154 Ill. 2d at 405-06, 609 N.E.2d at 325.

Thus, the *Cunningham* court concluded the statute of repose does not bar a plaintiff's action if he or she can demonstrate an ongoing course of continuous negligent medical treatment. *Cunningham*, 154 Ill. 2d at 406, 609 N.E.2d at 325. To prove such, the plaintiff must demonstrate: (1) the existence of a continuous and unbroken course of negligent treatment, and (2) the treatment was so related as to constitute one continuing wrong. *Cunningham*, 154 Ill. 2d at 406, 609 N.E.2d at 325. Thus, under *Cunningham*, not only does there need to be treatment, the treatment must be negligent, a continuous and unbroken course, and so related as to constitute one continuing wrong.

¶ 15 C. Summary Judgment and Certified Question

¶ 16 The certified question in this case arose from the trial court's denial of respondents' motion for partial summary judgment based on the statute of repose. Respondents argued the statute of repose barred petitioner's action as to Dr. Hartman's medical care before March 25, 2006. Respondents noted the facts were undisputed as to when Dr. Hartman provided treatment

to the decedent and for what ailments. They argued the issue of whether Dr. Hartman provided a continuous course of negligent treatment was a question of law because it was undisputed Dr. Hartman did not provide treatment for the specific condition of prostate cancer. Petitioner asserted Dr. Hartman provided a continuing course of treatment but did recognize questions of fact may exist as to whether Dr. Hartman complied with the standard of care and whether the treatment was a continuous course. Respondents' motion for a certified question noted the trial court denied their motion for partial summary judgment after a November 13, 2012, hearing and claimed the trial court found failing to screen for prostate cancer was the equivalent of "treatment for a specific condition." However, a report of proceedings for the November 12, 2012, hearing is not included in the record on appeal, and the trial court did not make any written findings.

¶ 17 The certified question proposed by respondents was fairly lengthy, and the trial court adopted the last few lines of the proposed question, omitting only a few words. Petitioner had objected to respondents' proposed question noting, *inter alia*, the proposed question presented a question of fact as to what the standard of care requires with regard to screening for prostate cancer. The trial court implicitly disagreed, noting its certified question was one of law.

¶ 18 On appeal, the parties' briefs show the standard of care is a contested issue in this case. In their reply brief, respondents argue the certified question asks, if such a duty to screen exists, does the failure to screen constitute treatment for a specific condition. However, that is not how the trial court's certified question is worded, and we are limited to the precise question certified by the trial court (*Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 57-58, 879 N.E.2d 910, 918 (2007)). If we answer the trial court's certified question in the affirmative, we will have found Dr. Hartman's failure to screen was not only treatment but also negligent and continuous.

Such findings would result in the statute of repose commencing on February 6, 2007, the last day Dr. Hartman saw the decedent as well as answering the question of liability. Moreover, we will have made findings of fact that are to be determined at trial and are clearly not appropriate with a Rule 308 certified question. See *Spears*, 2013 IL App (4th) 120289, ¶ 15, 986 N.E.2d 216. Additionally, to use an assumption, as suggested by respondents, results in us answering a hypothetical question, as petitioner may not be able to establish the standard of care imposes a duty to screen for prostate cancer. As stated earlier, we refrain from answering such questions. See *Spears*, 2013 IL App (4th) 120289, ¶ 15, 986 N.E.2d 216.

¶ 19 Generally, questions of the timeliness of a plaintiff's complaint and the time the statute of repose begins to run are questions of fact, but they may become questions of law if the crucial facts are undisputed and only one conclusion can be drawn from the undisputed facts. See *Jones v. Dettro*, 308 Ill. App. 3d 494, 498, 720 N.E.2d 343, 346 (1999). Here, while respondents focus on whether the failure to screen is "treatment" for purpose of determining a continued course of negligent treatment, the trial court's certified question asks for an answer on the ultimate determination of the existence of a continued course of negligent treatment. As explained earlier, such an answer encompasses multiple determinations, *i.e.*, the existence of treatment, negligent treatment, and continuous treatment. A question of fact clearly exists as to negligence as the parties dispute the standard of care. Moreover, at this point in the proceedings, the relevancy of the fact decedent was being treated for other conditions and had no symptoms of prostate cancer at his appointments with Dr. Hartman is unclear. While respondents note those facts several times in their briefs, petitioner asserts they are irrelevant. Thus, expert medical testimony may be needed to resolve the issue of treatment as well. For example, the treatment of

diabetes, one of the conditions for which the parties note the decedent saw Dr. Hartman, may or may not include screening for prostate cancer. It is too early in the proceedings to tell as the motion for partial summary judgment focused solely on the dates of the decedent's visits with Dr. Hartman and the fact those visits never involved prostate cancer.

¶ 20 Accordingly, we decline to answer the certified question as its ultimate disposition depends on the resolution of multiple factual predicates.

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we decline to answer the certified question as a resolution of the certified question depends upon questions of fact. We remand the cause to the Coles County circuit court for further proceedings.

¶ 23 Certified question not answered; cause remanded.